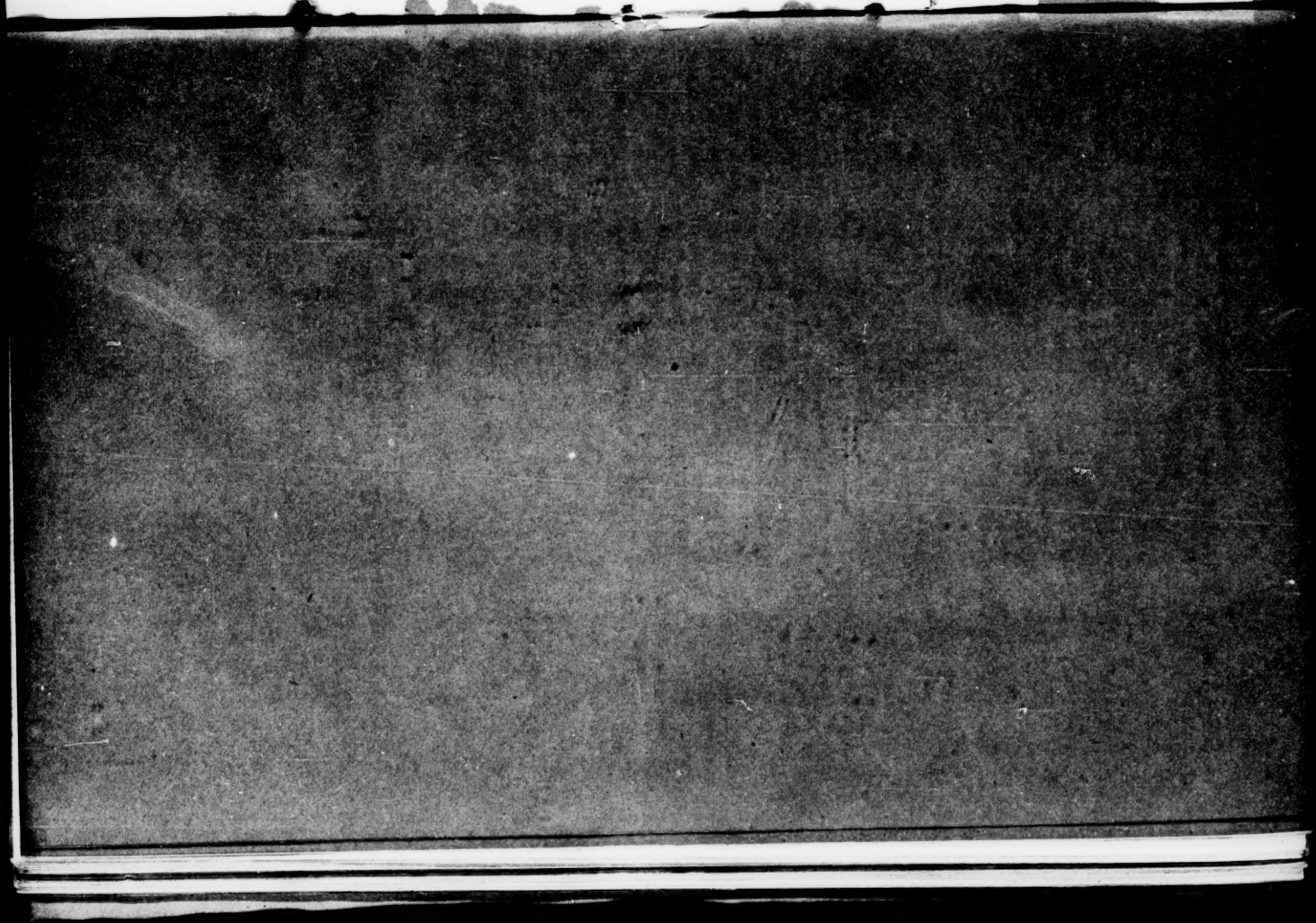
SUPREME COURT OF THE UNITED STATES.

No. 12.—ORIGINAL.

EX PARTE IN THE MATTER OF JOSIAH MORRIS AND JOHN F. JOHNSON, PETITIONERS.

FILED MARCH 3, 1879.



SUPREME COURT OF THE UNITED STATES.

No. 12.—ORIGINAL.

EX PARTE IN THE MATTER OF JOSIAH MORRIS AND JOHN F. JOHNSON, PETITIONERS.

1 *Motion.*

District court of the United States for the middle district of Alabama.—May term, 1869.

UNITED STATES
vs.
120 BALES COTTON—JOSIAH MORRIS & JOHN F. JOHNSON, claimants.

The Supreme Court of the United States having, at the December term thereof, to wit, on the 15th day of April, 1869, reversed the decree heretofore rendered by this court, and remanded the same to this court "with directions to cause restitution to be made to the appellants of whatever sum of money they have been compelled to pay under that decree;" now, motion is made by Josiah Morris to the honorable the said district court, to be tried on the 4th Monday in May, instant, or as soon thereafter as this honorable court will hear the same, for restitution to be made in said cause to Josiah Morris, of the sum of thirty one thousand six hundred and eighty-nine $\frac{55}{100}$ dollars, which the said Josiah Morris was compelled to pay under said decree upon an execution in the hands of John Hardy, then United States marshall for said dis-
2 trict, to wit, on the 26th day of March, 1867, as by his receipt, a copy of which is herewith filed, bearing said date, will more fully appear.

And the said Josiah Morris, the party who paid said money, upon an execution on said decree as aforesaid, will, at the same time, move the district court to compel the persons to whom a portion of said funds were paid, under the order of distribution heretofore made by this court to the said Josiah Morris, and to that end he prays the Hon'ble J Q. Smith, late district attorney of the United States, and John Hardy, late marshal of the United States, in said district, and E. C. V. Blake, esq'r., the clerk of this court, and one McCrosky, who, it was alleged, was an informer in said cause, be made parties to the said motion, as well as the present Francis Bugbee, esq'r., who represents the United States, but who received no moneys, be made parties to this motion, and notified to appear at said time in your honorable court, and show cause why this motion should not be granted.

May 13th, 1869.

Amended June 23d, 1869. And will move the court that his honor take any other steps, in consonance with law, to execute the mandate of the Supreme Court in this cause.

CHILTON AND THORINGTON,
For Morris.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judge of the district court of the United States for the middle district of Alabama, greeting:

Whereas lately in the district court of the United States for the middle district of Alabama before you, in a cause between the United States, libellants, and 120 bales of cotton—Josiah Morris and John F. Johnson, claimants, respondents, wherein the decree of said district court, entered in said cause on the seventeenth day of December, 1866, is in the following words, viz: "It is ordered, adjudged, and decreed that the United States have judgement of condemnation against the cotton, and judgement against the defendants, John F. Johnson and Josiah Morris, for the sum of thirty thousand dollars and costs; that execution issue therefor," as by the inspection of the transcript of record of the said district court, which was brought into the Supreme Court of the
4 United States by virtue of an appeal agreeably to act of Congress in such case made and [and] provided, fully and at large appears; and whereas in the present term of December, in the year of our Lord one thousand eight hundred and sixty-eight, the said cause on to be heard before the said Supreme Court on the said transcript of the record, and was argued by counsel, on consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said district court in this cause be, and the same is hereby, reversed; and it is futher ordered that this cause be, and the same is hereby, remanded to the said district court, with directions to cause restitution to be made to the appellants of whatever sum of money they have been compelled to pay under that decree. 15th April, '69.

You, therefore, are hereby commanded that such futher proceedings be had in said cause, in conformity to the opinion and decree of this court, as, according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Salmon P. Chase, Chief Justice of said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and sixty-eight

5 D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Filed 13 day of May, 1869, at 10.30 o'clock a. m.
E. C. V. BLAKE, *Clerk.*

JUNE 23, 1869.—Read on motion.—R. B.

United States district court for the middle district of Alabama.

THE UNITED STATES OF AMERICA
vs.
120 BALES COTTON—JOSIAH MORRIS & J. F. Johnson, claimants.

And for answer to said motion this defendant says, that if any money was collected from said Josiah Morris, as alleged in said motion, the

same was collected as alleged, on and by virtue of an execution duly and regularly issued by the clerk of the district court of the United States for the middle district of Alabama, on a judgement duly and legally rendered by said court in said cause, of which said cause said court had competent jurisdiction.

6 And this defendant futher says that afterwards, to wit, on the 29th day of December, A. D. 1866, the said court granted an order for the distribution of said money, a copy of which said order is hereto attached marked Exhibit "A," and prayed to be taken and considered as a part hereof.

And this defendant, futher answering, says that subsequently, to wit, at the June term of the said court, A. D. 1867, the said court, on motion being submitted, and after argument of counsel on both sides, ordered, adjudged, and decreed that one E. E. McCrosky was the informer in said cause and entitled to compensation as such, which [which] said order is hereto attached, marked Exhibit "B," and asked to be taken as a part hereof.

This defendant futher says that in obedience to, and in conformity with, the terms of said orders of distribution, the sum of fourteen thousand two hundred and forty-five $\frac{86}{100}$ dollars was paid to the said E. E. McCrosky, the said sum being one-half of the money collected from said Morris, after deducting the cost, charges, and disbursements legally incurred, agreeably to the terms of the order first above mentioned; that a receipt was given for said sum by said E. E. McCrosky, which

7 will be exhibited on trial of said motion; that the sum of fifteen hundred and thirty-two $\frac{50}{100}$ dollars was paid under said order of distribution to the Hon. James Q. Smith, who was the United States district attorney in the prosecution of said cause; that no part of the fees due to the said E. C. V. Blake, clerk of said court, was paid to him, owing to his long-continued absence beyond the jurisdiction of said court, and no part of said money passed into his hands owing to the same cause; but this defendant avers that the entire balance of said money collected from said Morris, to wit, the sum of fifteen thousand nine hundred and eleven $\frac{19}{100}$ dollars, was deposited by this defendant in the First National Bank of Selma, as this defendant had authority for doing under general orders from the proper department of the government at Washington, a copy of which said authority is hereto attached marked Exhibit "C," and prayed to be considered as a part of this answer.

This defendant futher says that a short time after said deposit was made, and before any portion of said money was withdrawn from said bank by this defendant, or any one else authorized thereto, the said bank suspended payment and business and went into liquidation,

8 and neither this defendant, nor any one else, so far as this defendant is advised, has been able to recover any portion of said fund so deposited, although this defendant and others, in the interest of the government, have made diligent efforts to that end.

And this defendant says that he has not now, nor had he at the time said motion was filed, nor has he had at any time since said bank suspended and said payments were made, any portion of said funds in his hands, or under his control; by reason of which fact this defendant says he is wholly incapable, in any sense, of restoring to said Morris any portion of said money.

And this defendant futher says that although the judgement of the said district court in said cause was reversed by said court, yet this defendant is advised and believes, and so states, that said judge-

ment of reversal was upon a question in no way effecting the merits of said cause, but this defendant is advised and believes and so avers that the said money, so collected from the said Morris, was the proceeds of the sale of certain cotton, which was in fact, in law, the prop-
9 erty of the United States; and which, or the proceeds thereof, said government is justly and legally entitled to have. All of which this defendant is ready to verify; wherefore he prays judgement, &c.

M. D. GRAHAM,
Attorney for John Hardy.

THE STATE OF ALABAMA, *Montgomery:*

Before me, Geo. H. Patrick, U. S. commissioner for the middle district of Alabama, personally came John Hardy, the defendant in the above motion, who, being by me duly sworn, on oath says that the facts, allegations, and statements contained in the foregoing plea or answer, when stated of his own knowledge, are true, and when stated on information and belief, he believes them to be true.

JOHN HARDY.

Sworn and subscribed to before me this the 4th day of June, A. D. 1869.

GEO. H. PATRICK,
U. S. Commissioner Mid. Dis. Ala.

10 *Exhibit A.*

District court of the United States for the middle district of Alabama.

UNITED STATES OF AMERICA *vs.* 120 BALES COTTON—JOSIAH MORRIS, JOHN F. Johnson. } Order of distribution.

In this proceeding a decree of condemnation having heretofore been rendered against 120 bales of cotton, and a judgement for the value thereof, namely, $30,000 against Josiah Morris and John F. Johnson, and execution to be issued thereon, it is now ordered as follows:

1st. That five per cent. of the amount of said judgement, when collected, be paid over to the United States district attorney, James Q. Smith, or a reasonable fee for his services in the prosecution of these proceedings.

2nd. That one per cent. of the amount of said judgement, when collected, be paid over to the United States marshal, John Hardy, or a reasonable fee for his services rendered in these proceedings.

3d. That one per cent. of the amount of said judgement, when collected, be paid over to the United States clerk, E. C. V. Blake, or a reasonable fee for his services rendered in these proceedings.

11 4th. That after all the costs, charges, and disbursements, legally incurred herein, be deducted from the amount of said judgement, one-half of the remainder to be paid over to E. E. McCroskey, who has heretofore lodged an information with the district attorney of the United States, which information is to be filed in the clerk's office herewith; the other one-half to be held in the registry of the court, subject to the order of the Secretary of the United States as provided by law.

5th. The clerk will take and file receipts under this order, with the names in these proceedings, and this order.

(Signed) RICHARD BUSTEED, *Judge.*

DECEMBER 29TH, 1866.

Exhibit B.

In the district court of the United States for the middle district of Alabama.

Present, the Honorable Richard Busteed.

UNITED STATES OF AMERICA
vs.
120 BALES OF COTTON—JOSIAH MORRIS AND J. F. JOHNSON, claimants.

A recovery having been heretofore had in favor of the United
12 States in the above-entitled proceedings, and execution having been issued upon the judgement therein, and the marshal of the United States, to whom the execution was issued, having made a return that the same has been fully satisfied.

And it being made to appear to the court, by the affidavit of E. E. McCroskey, the informer, and of James Q. Smith, esq., under whom, as district attorney of the United States for the middle district of Alabama, the proceedings in the above-entitled matter were instituted and conducted to a close, that the said E. E. McCroskey is the person who gave information of the facts upon which the right to a recovery was based.

And a motion being now made for a distribution to the informer of his moiety, according to the provisions of law in such case made and provided.

Wherefore upon reading and filing the said affidavit, and hearing James Q. Smith, esq., lately United States district attorney, in support of the motion, and Wm. P. Chilton, esq., opposed; and after due deliberation had thereupon, it is ordered, adjudged, and decreed that the said E. E. McCroskey is the informer in this matter, and that he is entitled to receive the one-half part of the recovery therein, and the clerk of this court is hereby authorized and directed to pay the said one-half unto the said E. E. McCroskey, or his legally authorized attorney, taking his receipt therefore & filing the same.

(Signed) RICHARD BUSTEED, *Judge.*

JAN'Y 4TH, 1867.

13 *Exhibit C.*

DEPARTMENT OF THE INTERIOR,
Washington, January 23d, 1866.

SIR: You are hereby informed that the Secretary of the Treasury, on the 19th instant, notified this department that pursuant to the authority contained in the 54th section of the act "to provide a national currency, secured by the pledge of United States stocks, and to provide for the circulation and redemption thereof," approved Feb'y 26th, 1863, he had employed as depositaries of public monies, except receipts from customs, the following banks in your State, viz: The First National Bank of Selma.

You are requested to acknowledge the receipt of this notice.

I am, sir, very respectfully, your obedient servant,

W. T. OTTO,
Ass't Sec'y of the Interior.

JOHN HARDY,
U. S. Marshal Middle Dist. of Ala.

14 District court of the United States, middle district of Alabama.—May term, 1869.

U. S. AMERICA
vs.
120 BALES OF COTTON—JOSIAH MORRIS & JOHN F. Johnson, defendants.

James Q. Smith, being duly sworn, on oath says that on the day of , 1865, he was appointed United States district attorney for the northern district of Alabama, in which the said middle district is included; that he immediatly entered upon the duties thereof as prescribed by law, and also under special instructions from the President and Attorney General of the United States directing him "to libel and bring to judgement, confiscation, and sale, property subject to confiscation within his district;" that under the laws of the United States and the [and the] said special instructions, he instituted proceedings by libel of information in the name of the United States, and in behalf of one E. E. McCroskey, as informer, against one hundred and twenty bales of cotton, and Josiah Morris and John F. Johnson, defendants, on the day of , 1866; that said proceedings were conducted and prosecuted by affient to a final judgement in favor of the United States and against the said Josiah Morris and John F.
15 Johnson for the sum of thirty thousand dollars, at the November term of said court, 1866; that said defendants prayed for an appeal to the Supreme Court of the United States, and entered into bonds for the costs and damages that may accrue by the sueing of said appeal, but said defendants failed to execute within the ten days precribed by law, or at any other time, such a bond as was necessary to supersede an execution on said judgement. A copy of said bond for costs and expences is hereto attached, marked A. (See bond in clerk's office.)

That execution was issued by the clerk of said court on said judgement, which was placed in the hands of the United States marshal for collection, and he collected the amount of said judg'ent, and credited the same in satisfaction thereof.

That on the 4th day of June, 1867, at chambers, proceedings were had to ascertain who the person was who gave the first information to affient, which caused the judgement aforesaid to be rendered, a copy of which is hereto attached, marked B.

That after the collection of said judgement in execution by the marshal, a final order of distribution was made, a copy of which is hereto attached, marked C, and under the first section of said order of distribution, affient received five per cent. of said judgement as his reasonable compensation for his services rendered in the conduct
16 and prosecution of said proceeding, and gave his receipts therefor to be filed with said order and the other papers in the case.

Affient having fully stated under what circumstances and for what services he received said compensation, respectfully submits:

1st. Whether the court has now lawful authority to alter a final order or decree rendered more than two years since, and under which affient has acquired a vested interest.

2d. Whether or not the defendants Johnson and Morris, in failing to take the legal and necessary steps to supersede the judgement and thereby prevent the distribution, have not waived any right they may have had and are now subject to the consequences of not superseding said execution.

3d. Whether or not having answered fully the motion on the motion docket to show cause why he should not refund the percentage received by him under the circumstances aforesaid, and under the order of distribution aforesaid, to the said Morris and Johnson, he ought not to be discharged from further answering said motion, with his reasonable costs.

JAMES Q. SMITH.

Sworn to and subscribed before me this the 11th day of June, A. D. 1869.

E. C. V. BLAKE,
Clk U. S. Dist. Court Mid. Dist. of Ala.

17 *Exhibit A.*

Know all men by these presents that we, Josiah Morris, John F. Johnson, and William H. Smith, are held and firmly bound unto [to] the United States of America in the sum of five thousand dollars, to be paid to the United States of America; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, dated this 4th day of April, 1867.

Whereas the above-bounden Josiah Morris and John F. Johnson have appealed to the Supreme Court of the United States from a decree of the district court of the United States for the middle district of Alabama, bearing date the 17th day of December, 1866, in a case in which the United States was libellant, and the said Josiah Morris and John F. Johnson were respondents; now, therefore, the condition of this obligation is such, that if the above-named appellants, Josiah Morris & John F. Johnson, shall prosecute this appeal with effect, and pay all such costs & expenses as shall be awarded against them as such appellants, then in then, then this obligation to be void; otherwise to remain in full force and effect.

JOSIAH MORRIS. [SEAL.]
JOHN F. JOHNSON. [SEAL.]
WM. H. SMITH. [SEAL.]

I approve of this bond.
April 4th, 1869.

RICHARD BUSTEED, *Judge.*

18 *Exhibit D.—Informer's statement.*

[Copy.]

To James Q. Smith, esquire, U. S. dist. att'y for the middle district of Alabama:

The undersigned respectfully submits to the said U. S. dist. att'y the following information, to be used by him in proceedings to be instituted by him in behalf of the United States, in the manner provided in the act or acts of Congress making provision for informants in the event of condemnation of property, and to this end and object the undersigned would state —

That in the year 1861, or 1862, one Thomas H. Watts, a person engaged in the rebellion, subscribed, or sold, or gave one hundred and sixty-five bales of cotton to carry on the rebellion and for the defence of the Confederate States of America. That said cotton was taken charge of by James A. Farley, cotton agent of the rebel government at Montgomery,

and by him stored in the cotton warehouse known as the cotton warehouse of [of] J. F. Johnson & Co., in the city of Montgomery, on account of the said Confederate States.

That 120 bales of said cotton remained in said warehouse until April, 1863, when it was moved therefrom, without authority, by J. F.
19 Johnson and Josiah Morris, who caused it to be moved to a private warehouse or garden, and, after remain'g there for some 4 or 5 weeks, was moved and sold by the said Johnson and Morris, and the proceeds appropriated to their own use. That said cotton was sold some time in May or June to one Geo. P. Floyd. That the following named witnesses will prove all the necessary facts:

. Wesley Barnes will prove that he, by direction of J. F. Johnson, delivered 120 bales of said cotton to one James A. Carpenter, to be hauled to J. F. Johnson's private garden; and to James A. Carpenter will prove that he was employed by J. F. Johnson and Josiah Morris to haul on his drays said cotton to said garden. Norton S. Berry will prove he delivered said cotton to Carpenter, or to drays under his charge. George P. Floyd will prove he purchased the cotton from Josiah Morris and paid him for it through D. H. Shular. H. W. Crittenden will prove same facts. James H. Farley, C. S. A. cotton agt., will prove that the cotton was Confederate States cotton and in his possession, as the property of the said Confederate States, until moved by Johnson and Morris.

E. E. McCROSKEY.

Sworn to & subscribed before me this the 10 day of July, A. D. 1866.

E. C. V. BLAKE,
Per A. R. STORER,
Dep'ty Clerk U. S. Dist. Court Mid. Dist. Alabama.

20 *Exhibit C.*

District court of the United States for the middle district of Alabama.—Nov'b'r term, 1866.

UNITED STATES OF AMERICA
vs.
120 BALES OF COTTON—JOSIAH MORRIS AND John F. Johnson. } Order of distribution.

In this proceeding a decree of condemnation having heretofore been rendered against 120 bales of cotton, and a judgement for the value theref, namely, $30,000, against Josiah Morris and Josiah Johnson, and execution to be issued thereon, it is now ordered as follows:

First. That five per cent. of the amount of said judgment, when collected, be paid over to the United States district attorney, James Q. Smith, as a reasonable fee for his services in the prosecution of these proceedings.

Second. That one per cent. of the amount of said judgment, when collected, be paid over to the United States marshal, John Hardy, as a reasonable fee for his services rendered in these proceedings.

Third. That one per cent. of the amount of said judgment, when collected, be paid over to the United States clerk, E. C. V. Blake, as a reasonable for his services rendered in these proceedings.

21 Fourth. That after all the costs, charges, and disbursements legally incurred herein are deducted from the amount of said judgment, one-half of the remainder to be paid over to E. E. McCroskey, who has heretofore lodged and information with the district attorney of

the United States, which information is to be filed in the clerk's office herewith, and the other one-half to be held in the registry of the court, subject to the order of the Secretary of the United States Treasury, as provided by law.

Fifth. The clerk will take and file the receipts under this order with the papers in these proceedings and this order.

RICHARD BUSTEED, *Judge.*

DEC'R 29TH, 1869.

Copy of original.

In the district court of the United States for the middle district of Alabama.

U. S. OF AMERICA
vs.
120 BALES OF COTTON—JOSIAH MORRIS AND Jno. F. Johnson. } Copy.

James Q. Smith, being duly sworn, deposes & says that, as district attorney of the United States for the middle district of Alabama,
22 he instituted proceedings in the above-entitled matter, and as such attorney conducted the legal proceedings therein to trial, judgment, and execution; that upon the judgment pronounced by the court, execution was issued to the marshal of the United States for the middle district of Alabama, who afterwards levied upon the property of the above-named defendants, and caused the said execution to be satisfied therefrom. Deponant further says that he received from E. E. McCrosky, of said middle district of Alabama, information of all the facts upon which the libel of information was subsequently based and filed; that upon the trial those facts were made to appear in proof, and that they were all material to the recovery. Deponant further says that he derived the knowledge of the said facts from the said E. E. McCroskey alone, and that neither deponant, nor any other person, so far as deponant's knowledge extends, had information of such facts. Deponant further says that before he caused the libel of information in this matter to be filed, he took and reduced to writing the information so conveyed to him by the said E. E. McCroskey, and caused said writing to be subscribed, & the truth thereof sworn to, by the said E. E. McCroskey, & that the said writing is hereto annexed, marked D.

JAMES Q. SMITH.

Sworn to & subscribed before me this 4th June, A. D. 1867.

RICHARD BUSTEED,
U. S. Dist. Judge.

23 *Exhibit B.*

In the district court of the United States for the middle district of Alabama.

Present, the Honorable Richard Busteed.

UNITED STATES OF AMERICA
vs.
120 BALES OF COTTON—JOSIAH MORRIS AND John F. Johnson, claimants.

A recovery having been heretofore had in favour of the United States

in the above-entitled proceeding, and execution having been issued upon the judgment therein, and the marshal for the United States, to whom the said execution was issued, having made a return that the same has been fully satisfied, and it being made to appear to the court by the affidavit of E. E. McCroskey, the informer, and of James Q. Smith, esquire, and under whom, as district attorney of the United States for the middle district of Alabama, the proceedings in the above-entitled matter were instituted and conducted to a close, that the said E. E. McCroskey is the person who gave information of the facts upon which the right to a recovery was based; and a motion being now made for a distribution to the informer of his moiety according to the provisions of law in such case made and provided:

24 Therefore upon reading and filing the said affidavits, and hearing James Q. Smith, esquire, lately district attorney of the United States in support of the motion, and William P. Chilton, esquire, opposed, and after due deliberation had thereupon, it is ordered, adjudged, and decreed that the said E. E. McCroskey is the informer in this matter, and that he is entitled to receive the one-half part of the recovery therein, and the clerk of this court is hereby authorized and directed to cause the said one-half to be paid over to the said E. E. McCroskey or his legally authorized attorney, taking his receipt therefore and filing the same.

RICHARD BUSTEED, *Judge D. C.*

JUNE 4, 1867.

District court of the United States for middle district of Alabama.

UNITED STATES
vs.
120 BALES COTTON—MORRIS & JOHNSON, claimants.

Motion against this respondent for restitution of moneys alleged to have been received by him in this cause.

And now comes the defendant E. C. V. Blake, in proper person and by his attorney, and says that he has not received any portion of the funds arising from the above-entitled cause, and prays that the motion be dismissed as to himself.

JNO. T. MORGAN,
25 *Attorney for Defendant.*

Before me, Geo. H. Patrick, U. S. com'r, personally appears E. C. V. Blake, who, being first duly sworn, says that the above statement is true to the best of his knowledge & belief.

E. C. V. BLAKE.

Subscribed & sworn to before me this 23d day of June, 1869.
GEO. H. PATRICK, *U. S. Com's'r.*

District court of the United States, middle district of Alabama.

UNITED STATES
vs.
120 BALES COTTON—MORRIS & JOHNSON, claimants.

Motion against defendant for restitution of money received in this cause.

And now comes Cornelius Cadle, jr., one of the defendants in a mo-

tion made in the above-stated case at the May term of the U. S. dist. court for the middle district of Alabama, 1869, and says that on the 30th day of May, A. D. 1867, he was duly appointed a receiver of the First National Bank of Selma, by the Comptroller of the Currency of the United States, under and by virtue of the power conferred on the said Comptroller in an act of the Congress of the United States entitled "An act to provide a national currency, secured by a pledge of United
26 States bonds, and to provide for the circulation and redemption thereof," passed the 3rd day of June, A. D. 1864; and defendant avers that he executed a bond, with good security, in the sum of twenty thousand dollars, as required by said Comptroller, and thereupon received from said Comptroller a commission under his official seal, as receiver aforesaid, dated 30th day of May, A. D. 1867; and the said defendant thereupon entered upon the discharge of his duties as such receiver, as provided in the fiftieth section of the act of Congress aforesaid; and that he has been since the time of his appointment until the present time, and now is, the receiver of the First National Bank of Selma, by virtue of his commission aforesaid, which commission is now here to the court shown; that he has not received, either in his individual capacity or as receiver aforesaid, any portion of the funds arising from the above-entitled cause, nor has he received any moneys from any of the officers of the U. S. court for the middle district of Alabama as receiver as aforesaid, on deposit or otherwise as such a receiver, except from executions issued on judgments obtained in this court against debtors of said bank; defendant avers that he has no personal knowledge of any moneys being deposited in said national bank to the the credit of this honorable court or any of its offi-
27 cers; but that upon taking possession of the books and assets of every description whatsoever of said "The First National Bank of Selma" he found on the books of said bank, to the credit of the United States district court for the middle district of Alabama, the sum of thirty-one thousand and thirty-four $\frac{61}{100}$ dollars, and to the credit of John Hardy, United States marshal, the sum of forty-five thousand three hundred and fifty-five $\frac{18}{100}$ dollars. The defendant avers that his duty as such receiver aforesaid, under the act aforesaid, requires that he shall pay over to the Treasurer of the United States all money made by him from the assets of the said "The First National Bank of Selma," and that he has paid over to such Treasurer all moneys that have come to his hands as such receiver, except a small sum, to wit, $1,200; wherefore this defendant asks that the motion be dismissed as to himself.

D. C. COMPTON,
Att'y for Defendant.

Before me, George H. Patrick, United States commissioner middle district of Alabama for the middle district of Alabama, personally appeared Cornelius Cadle, jr., who, being first duly sworn, says that the above statement is true to the best of his knowledge and belief.

CORNELIUS CADLE, JR.

Sworn to and subscribed before me this 23rd day of June, 1869.

GEO. H. PATRICK,
U. S. Commissioner Mid. Dist. Alabama.

Filed 23rd June, '69.

E. C. V. BLAKE, *Clerk.*

28 *Amended answer.*

Cornelius Cadle, jr., receiver of the First National Bank of Selma, states, as an amendment to his answer in the case of the United States vs. 120 Bales of Cotton—Morris & Johnson, claimants—that immediately after he was appointed a receiver of said bank he transmitted to the Comptroller of the Currency of the United States, in accordance with his directions, a full and complete statement, copied from the books of said bank, showing and setting forth the deposit account of all the depositors in said bank, and including the accounts of the moneys deposited to the credit of the district court of the United States for the middle district of Alabama; and also of John Hardy, as marshal of the United States for said district.

CORNELIUS CADLE, JR.,
Receiver First National B'k of Selma.

Filed June 23rd, 1869.

E. C. V. BLAKE, *Clerk.*

29 To the Honorable the Justices of the Supreme Court of the United States:

The undersigned, the judge of the district courts of the United States for the State of Alabama, respectfully represents—

That heretofore, on or about the 17th day of December, A. D. 1866, in a certain cause then pending in the district court of the United States for the middle district of Alabama, between the United States, plaintiffs and libellants, and John F. Johnson and Josiah Morris, defendants, it was, by the judgment of the said court, "ordered, adjudged, and decreed that the United States have judgment of condemnation against the cotton, and judgment against the defendants John F. Johnson and Josiah Morris for the sum of thirty thousand dollars and costs, and that execution issue therefor." That afterwards a writ of execution was delivered to the marshal of the United States for the middle district of Alabama, requiring him to satisfy the aforesaid judgment of the property of the defendants, and that said marshal, as will more fully hereafter appear, satisfied the same out of the property of the said Josiah Morris, one of the defendants in the aforesaid action.

That afterwards, and on or about the 29th day of December, 1866, in pursuance of the eighth section of an act of Congress, entitled
30 "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels," approved July 17th, 1862, the said district court made an order fixing the fees and charges of its officers for their services in the aforesaid suit. That to such order was appended a direction for the distribution of the remainder of the proceeds when collected, after deducting the allowances so as aforesaid made and the other legal charges and disbursements, if any. That the whole of this order, as it appears from the records, and which by the attorney for the United States, who drew it up, is entitled an "order of distribution," is in words and figures following, to wit:

"District court of the United States for the middle district of Alabama, November term, 1866.

"U. S. AMERICA
vs.
120 BALES OF COTTON—JOSIAH MORRIS AND John F. Johnson. } Order of distribution.

"In this proceeding a decree of condemnation having heretofore been

rendered against 120 bales of cotton, and a judgment for the value thereof, namely, thirty thousand dollars, against Josiah Morris and John F. Johnson, and execution to be issued thereon, it is now ordered as follows:

"1st. That five per cent. of the amount of said judgment, when collected, be paid over to the United States district attorney, J. Q. Smith, as a reasonable fee for his services in the prosecution of these proceedings.

"2d. That one per cent. of the amount of said judgment, when collected, be paid over to the United States marshal, John Hardy, as a reasonable fee for his services rendered in these proceedings.

"3d. That one per cent. of the amount of said judgment, when collected, be paid over to the United States clerk, E. C. V. Blake, as a reasonable fee for his services rendered in these proceedings.

"4th. That after all the costs, charges, and disbursements legally incurred herein are deducted from the amount of said judgment, one-half of the remaider to be paid over to E. R. McCrosky, who has heretofore lodged an information with the district attorney of the United States, which information is to be filed in the clerk's office herewith. The
31 other one-half to be held in the registry of the court subject to the order of the Secretary of the United States, as provided by law.

"5th. The clerk will take and file receipts under this order, with the papers in these proceedings, and this order.

"RICHARD BUSTEED, *Judge.*

"DECEMBER 29TH, 1866."

That on or about the 4th day of April, A. D. 1867, more than ten days, exclusive of Sundays, having elapsed, since the rendition of the said judgment, on the 17th day of December, A. D. 1866, and no writ of error, as provided by the 23d section of the judicial act of 24th December, 1789, having been served, and within that time no supersedeas or stay of exection of the said judgment having been prayed for or allowed, the said defendants, Johnson and Morris, prayed an appeal from the said decision of the said district court, in the words and figures following, to wit:

"District court of the United States for the middle district of Alabama.

"THE U. S. OF AMERICA
vs.
JOSIAH MORRIS. JOHN F. JOHNSON.

"The above-named respondents, conceiving themselves aggrieved by the final sentence or decree entered on the 17th day of December, one thousand eight hundred and sixty-six, in the above-entitled cause, doth hereby appeal therefrom to the Supreme Court of the United States; and they pray that this their appeal may be allowed, and that a transcript of the record, proceedings and evidence in the cause, duly authenticated, may be sent to the said Supreme Court.

"JOSIAH MORRIS.
"JOHN F. JOHNSON."

And on the same day made and executed their certain appeal bond, conditioned that the appellants should prosecute their appeal with

effect, and pay all such costs and expenses as should be awarded against them.

That thereupon, the said the district judge appended to the said defendants' prayer for an appeal, his allowance thereof, which
32 allowance is in words and figures following, to wit:

"The appeal prayed for in the above-entitled cause, by the aforesaid Josiah Morris and John F. Johnson, is hereby allowed, sufficient security for the costs having been duly given, and approved by me, this 4th day of April, 1867.

"RICHARD BUSTEED,
"*Judge of the District Courts of the United States for Alabama.*"

That subsequently to the taking and allowance of the aforesaid appeal, a paper writing, signed by the district judge, was served upon the attorney for the claimants and defendants, Morris and Johnson; which said writing is in words and figures following, to wit:

"MONTGOMERY, *June* 30, 1867.

"UNITED STATES OF AMERICA
vs.
120 BALES OF COTTON—JOHNSON & MORRIS, CLAIMANTS.

"SAMUEL F. RICE, Esq., *Attorney for Claimants:*

"SIR: You were heretofore informed in writing, by me, that the funds made upon execution in the above-entitled proceedings would be kept in the registry of the court to enable you to take the necessary steps by way of appeal, to have the judgment therein reviewed. The informer, E. E. McCroskey, denied my right to make an order that postpones the receipt of that portion of the monies awarded him by statute. This is to notify you that I will hear such argument on the question as counsel on either side shall submit, to-morrow, the 4th day of June, instant, at ten o'clock a. m., at the court-room in this city.

"Yours, &c.,

"RICHARD BUSTEED, *Judge.*"

And thereupon, and after hearing argument by counsel for the informer, who also represented the attorney for the United States, and argument by counsel for the claimants, and due deliberation
33 being had thereupon, the said the district judge made an order in the words and figures following, to wit:

"UNITED STATES OF AMERICA
vs.
120 BALES OF COTTON—JOSIAH MORRIS AND J. F. JOHNSON, claimants.

"A recovery having been heretofore had in favor of the United States in the above-entitled proceedings, and execution having been issued upon the judgment therein, and the marshal for the United States, to whom the said execution was issued, having made a return that the same has been fully satisfied; and it being made to appear to the court, by the affidavit of E. E. McCroskey, the informer, and of James Q. Smith, esq., under whom, as district attorney of the United States for the middle district of Alabama, the proceedings in the above-

entitled matter were instituted and conducted to a close, that the said E. E. McCroskey is the person who gave information of the facts upon which the right to recover was based; and a motion being now made for a distribution to the informer of his moiety, according to the provisions of law in such case made and provided:

"Therefore, upon reading and filing the said affidavits, and hearing James Q. Smith, esq., lately district attorney of the United States, in support of the motion, and William P. Chilton, esq., opposed, and after due deliberation had thereupon, it is ordered, adjudged, and decreed that the said E. E. McCroskey is the informer in this matter, and that he is entitled to receive the one-half part of the recovery therein, and the clerk of this court is hereby authorized and directed to pay the said one-half unto the said E. E. McCroskey, or his legally authorized attorney, taking his receipt therefor, and filing the same.

"RICHARD BUSTEED, *Judge.*

"JUNE 4TH, 1867."

The foregoing, it is believed, is a complete presentation of the status of this case, before and at the time the error book was made up for the supreme bench. The district judge is advised and believes
34 that the above order made by him on the 4th of June, 1867, for distribution to the informer, formed no part of the record upon which the appellate tribunal was asked to pronounce its judgment. An examination of the "transcript of record," No. 163, filed in this case, in the Supreme Court, December 4th, 1867, and furnished the undersigned by the attorney for Morris, shows that the order of distribution of June 4th, 1867, is omitted therefrom, and the district judge directs the specific attention of the honorable the justices of the Supreme Court to the omission; supposing that if the fact was known to the Supreme Court, that distribution to the informer had been ordered, some other judgment than the one it rendered might have been pronounced.

It is proper to state in this connection, that when the undersigned, the district judge, assumed the actual discharge of the duties of his office, he found it to be a very common practice for attorneys to take original papers from the files, and from the custody of the clerk's office, and retain them in their own possession until it suited their convenience to return them. By this means, important records were often mislaid, and sometimes lost. The undersigned, the district judge, at an early period, promulgated strict rules on this subject, which he supposed had the effect of curing the evil. In regard to the order for distribution, made by him on June 4th, 1867, the fact, as the district judge believes it to be, is, that either the marshal or the district attorney retained it in his possession, and the clerk, (Mr. Blake,) procured it from one of them some time in the spring of 1869, and placed it on the files of the court, where it now is. No reflection, however, is intended to be cast upon the good faith or professional conduct of the persons who made up the record for the Supreme Court.

The undersigned, the said district judge, further represents that the case on appeal was submitted to the Supreme Court at the December term, 1868, but the district judge is not advised whether argu-
35 ment was made upon behalf of the United States, or whether the case was submitted upon briefs and points, or whether it was merely submitted upon the case as made by the appellants.

The district judge presumes, however, that the Attorney General, or his assistant, did all they deemed necessary to guard and protect the interests of the appellees.

That at the May term, 1869, of the district court of the United States for the middle district of Alabama, a motion was entered upon the motion docket of that court in words and figures following, to wit:

"District court of the United States for the middle district of Alabama.—May term, 1869.

"UNITED STATES
vs.
120 BALES OF COTTON—JOSIAH MORRIS AND John F. Johnson, claimants.

"The Supreme Court of the United States having, at the December term thereof, A. D. 1868, to wit, on the 15th day of April, 1869, reversed the decree heretofore rendered by this court, and remanded the same to this court, with direction to cause restitution to be made to the appellants of whatever sum of money they have been compelled to pay under that decree, now, motion is made by Josiah Morris to the honorable the said district court, to be tried on the 4th Monday in May instant, or as soon thereafter as this honorable court will hear the same, for restitution to be made in said cause to Josiah Morris of the sum of thirty-one thousand six hundred and eighty nine 55-100 dollars, which the said Josiah Morris was compelled to pay under said decree, upon an execution in the hands of John Hardy, then United States marshal for said district, to wit, on the 26th day of March, 1867, as by his receipt, a copy of which is herewith filed, bearing said date, will more fully appear.

"And the said Josiah Morris, the party who paid the said money upon an execution on said decree as aforesaid, will at the same time move the honorable the district court to compel the persons to whom a portion of said funds were paid under the order of distribution heretofore made by this court to the said Josiah Morris; and to that end he prays the Honorable James Q. Smith, late district attorney
36 of the United States, and John Hardy, late marshal of the United States, in said district, and E. C. V. Blake, esq., the clerk of this court, and one ——— McCroskey, who, it was alleged, was an informer in said cause, be made parties to said motion, as well as the present district attorney, Francis Bugbee, esq., who represents the United States, but who received none of said moneys, and notified to appear at said time in your honor's court, and show cause why this motion should not be granted.

"May 13, 1869.

"JOSIAH MORRIS,
"By CHILTON & THORINGTON,
"*His Attorneys.*"

That afterwards, to wit, on the 23d day of June, 1869, at the said May term, upon the regular call of the motion docket, the above motion came on to be heard, and the attorneys for the motion added to the foregoing notice a clause in words and figures following, to wit:

"And will move the court that his honor take any other step in consonance with the law to execute the mandate of the Supreme Court in this cause.

"CHILTON & THORINGTON,
"*For Morris.*"

That this motion as amended came on to be heard on the 23d day of June, 1869, and occupied the attention of the court for two days; that the appellants, Johnson & Morris, did not apply for or issue any subpœnas for any witnesses, but that all the parties named in the notice of motion, except McCroskey, appeared in person, or by attorney, and the court on its own motion directed Cornelius Cadle, junior, commissioned by the Comptroller of the Currency a receiver of the assetts which were of the First National Bank of Selma, to be made a party to the proceeding. Cadle was in court at the time of this direction, and appeared, as did the other parties, by attorney.

That it appeared that no notice of the motion to execute the mandate had been given to or served upon McCroskey, the informer, either by mail or publication, or otherwise, and this was stated in open court by the counsel for Morris. It also appeared that McCroskey was
37 not a resident of the State of Alabama, and it did not appear that he was within the State of Alabama, so that he might be served either with the process of subpœna, or with less formal notice.

That the salient and material facts which appeared in proof, upon the oral examination of the witnesses James Q. Smith, E. C. V. Blake, and Josiah Morris; and by the written answers under oath of John Hardy, lately the marshal of the United States for the middle district of Alabama, and the same officer who executed the writ of fieri facias; of James Q. Smith, lately district attorney of the United States for the said district; of E. C. V. Blake, the clerk of the district court of the United States for said district; and of Cornelius Cadle, junior, are substantially these:

1st. In the month of January, or February, 1866, John Hardy, then marshal as aforesaid, received from the Department of the Interior, at Washington, a circular in words and figures following, to wit:

"DEPARTMENT OF THE INTERIOR,
"*Washington, January 23, 1866.*

"SIR: You are hereby informed that the Secretary of the Treasury, on the 19th instant, notified this department that, pursuant to the authority contained in the 54th section of the act 'to provide a national currency secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof,' approved February 25th, 1863, he had employed as depositories of public moneys, except receipts from customs, the following banks in your State, viz: The First National Bank of Selma.

"You are required to acknowledge the receipt of this notice.

"I am, sir, very respectfully, your obedient servant,

"W. T. OTTO,
"*Assistant Secretary of Interior.*

"JOHN HARDY, Esq.,
"*U. S. Marshal for Middle District of Alabama.*"

38 2d. A letter, similar in all respects to the above letter to Hardy, was received by E. C. V. Blake, the clerk of the district court.

3d. The said Hardy and the said Blake, respectively, complied with the instructions contained in the above letters of the Secretary of the Interior, and at the time of the failure of the First National Bank of Selma, which occurred some time in the spring of 1867, there was found on the books of the said bank, to the credit of the United States district court for the middle district of Alabama, for moneys deposited by

E. C. V. Blake, clerk, the sum of thirty-one thousand and thirty-four 60-100 dollars, and to the credit of John Hardy, U. S. marshal, the sum of forty-five thousand three hundred and fifty-five 18-100 dollars, for moneys deposited by him.

4th. At the May term, 1867, of the district court for the middle district of Alabama, such proceedings were had that, on the first day of June, A. D. 1867, by the judgment and determination of this court, the said association, known as the First National Bank of Selma, "had violated the provisions of the said act of Congress, and thereupon the court adjudged and decreed that said banking association had forfeited all its rights, privileges, and franchises derived from said act of Congress, and declared the same dissolved."

5th. That John Hardy, for the money received by him in satisfaction of the execution issued against the defendants, Johnson and Morris, gave a receipt in words and figures following, to wit:

"District court of the United States for the middle district of Alabama.

"UNITED STATES
vs.
JOSIAH MORRIS, JOHN F. JOHNSON.

"Received, Montgomery, March 25th, 1867, from Josiah Morris, the following stated sums of money, as full satisfaction of the above-stated execution, viz:

39	Judgment	$30,000 00
	Interest	653 00
Clerk's fees		23 90
Marshal's fees		35 10
Attorney's fees		30 00
Witness' fees		193 55
Marshal's commissions		754 00
		$31,689 55

"JOHN HARDY,
" *U. S. Marshal Middle District of Alabama.*"

6th. On the hearing of the aforesaid motion to carry into execution the mandate of the Supreme Court, the attorneys for the appellants put in as proof a paper showing that the appellant Josiah Morris was the only real party in interest in the recovery back of the moneys made by the marshal in satisfaction of the execution issued by the court below; this paper is in words and figures following, to wit:

"District court of the United States, middle district of Alabama.—Pending spring term, 1869.

"I, John F. Johnson, do hereby make oath that the money collected on an execution in favor of the United States, and against Josiah Morris and myself, issued from the district court of the United States at Montgomery, on the 14th day of January, 1867, for the sum of thirty thousand dollars, and interest from the 17th day of December, 1866, and also the sum of two hundred and eighty-two 55-100 dollars, adjudged for cost, &c., was paid by Josiah Morris to the marshal, and the said Morris is enti-

tled to the whole of said money, if restitution is made. This defendant has paid no part of said money.

"J. F. JOHNSON.

"Sworn to and subscribed before me this 25th May, 1869.
"E. C. V. BLAKE, *Clerk.*"

7th. Cornelieus Cadle, as such receiver as aforesaid, did not himself receive any of the moneys deposited by Hardy or Blake.

The only moneys he received in person were upon executions
40 issued on judgments obtained in the district court against debtors of the bank, and such moneys he paid into the treasury of the United States, "excepting a small sum, to wit, twelve hundred dollars," which he had on hand at the time he filed his answer to the motion.

8th. E. C. V. Blake, the clerk of the middle district, did not receive any part of the moneys made by the marshal upon the execution against Johnson and Morris. This appears by his sworn answer, and is conceded on all hands.

9th. James Q. Smith received from John Hardy, the marshal, five per cent. on the amount of the judgment, recovered against Johnson and Morris, this being according to the order of the court of December 29, 1866, which order is hereinabove set forth. Mr. Smith was called by the attorney for Morris, and examined orally upon the motion in aid of the execution of the mandate of the Supreme Court. The district judge has not now before him the minutes of Mr. Smith's testimony, and an application to Chilton and Rice, the attorneys for Morris on the motion, to be loaned their minutes of that evidence was not successful, these gentlemen saying they were unable to find the minutes thereof kept by them. It is not material, however, that this testimony should be appended hereto. The controversy in respect of it arose upon the attempt of the appellant Morris on the motion, to examine Mr. Smith as to certain alleged transactions of a business character between him and the informer, McCroskey, in relation to the moneys awarded McCroskey as informer, and paid to him by Hardy, the marshal. On objection of counsel for Mr. Smith, the district judge held that the inquiries were not pertinent to the issue then before him.

10th. John Hardy, marshal of the United States for the middle district of Alabama, received the above-mentioned sum of thirty-one thousand six hundred and eighty-nine 55-100 dollars, in satisfaction of the judgment and execution in the case of the United States of Amer-
41 ica vs. Johnson & Morris, claimants of one hundred and twenty bales of cotton. The disposition made by him of this money appears in his answer to this motion, in aid of the mandate filed in the district court, and this his answer is in words and figures following, to wit:

"United States district court for the middle district of Ala.

"THE U. S. STATES OF AMERICA
vs.
120 BALES OF COTTON—JOSIAH MORRIS & J. F. JOHNSON, claimants.

"And for answer to said motion, this defendant says that if any money was collected from said Josiah Morris, as alleged in said motion, the same was collected as alleged on and by virtue of an execution duly

and regularly issued by the clerk of the district court of the United States for the middle district of Alabama, on a judgment duly and legally rendered by said court in said cause, of which said cause said court had competent jurisdiction.

"And this defendant further says that afterwards, to wit, on the 29th day of December, A. D. 1866, the said court granted an order for the distribution of said money, a copy of which said order is hereto attached, marked Exhibit A, and prayed to be taken and considered as a part hereof.

"And this defendant further says that subsequently, to wit, at the June term of said court, A. D. 1867, the said court, on motion being submitted, and after argument of counsel on both sides, ordered, adjudged, and decreed that one E. E. McCroskey was the informer in said cause, and entitled to compensation as such, which said order is hereto attached, marked Exhibit B, and asked to be taken as a part hereof.

"This defendant further says that in obedience to, and in conformity with, the terms of said orders of distribution, the sum of fourteen thousand two hundred and forty-five 86-100 dollars was paid to the said E. E. Croskey, the said sum being one-half of the money collected from said Morris, after deducting the costs, charges, and disbursements legally incurred, agreeably to the terms of the order first above mentioned. That a receipt was given for said sum by said E. E. McCroskey, which will be exhibited on trial of said motion. That the sum of fifteen hundred and thirty-two 50-100 dollars was paid under said
42 order of distribution to the Hon. Jas. Q. Smith, who was the United States district attorney in the prosecution of said cause. That no part of the fees due to the said E. C. V. Blake, clerk of said court, was paid to him, owing to his long-continued absence beyond the jurisdiction of said court, and no part of said money passed into his hands, owing to the same cause; but this defendant avers that the entire balance of said money collected from the said Morris, to wit, the sum of fifteen thousand nine hundred and eleven and 19-100 dollars, was deposited by this defendant in the First National Bank of Selma, as this defendant had authority for doing under general orders from the proper department of the government at Washington, a copy of which said authority is hereto attached, marked Exhibit C, and prayed to be considered as a part of this answer.

"This defendant further says that a short time after said deposit was made, before any portion of said money was withdrawn from said bank by this defendant, or any one else authorized thereto, the said bank suspended payment and business, and went into liquidation, and neither this defendant nor any one else, so far as this defendant is advised, has been able to recover any portion of said fund so deposited, although this defendant and others in the interest of the government have made diligent efforts to that end.

"And this defendant says that he has not now, nor had he at the time said motion was filed, nor has he had at any time since said bank suspended, and said payments were made, any portion of said funds in his hands or under his control, by reason of which fact, this defendant says he is wholly incapable, in any sense, of restoring to said Morris any portion of said money.

"And this defendant further says that although the judgment of said district court in said cause was reversed by said Supreme Court, yet this defendant is advised and believes, and so states, that said judgment of reversal was upon a question in no way affecting the merits of said cause; but this defendant is advised and believes, and so avers, that

the said money so collected from said Morris was the proceeds of the sale of certain cotton which was in fact and in law the property of the United States, and which, or the proceeds thereof, said government is justly and legally entitled to have; all of which this defendant is ready to verify; wherefore he prays judgment, &c.

"M. D. GRAHAM,
"*Attorney for John Hardy.*

43 "THE STATE OF ALABAMA, *Montgomery County:*

"Before me, George H. Patrick, U. S. commissioner for the middle district of Alabama, personally came John Hardy, the defendant in the above motion, who, being duly sworn on oath, says that the facts, allegations, and statements contained in the foregoing plea or answer, when stated of his own knowledge, are true, and when stated on information and belief, he believe them to be true.

"JOHN HARDY.

"Sworn to and subscribed before me this 4th day of June, A. D. 1869.
GEO. H. PATRICK,
"*U. S. Commissioner Mid. Dist. Ala.*"

It is to the foregoing state of facts that the mandate of the Supreme Court in the case of the United States versus Johnson & Morris attaches. The enjoining clause of that mandate is in these words:

"And it is further ordered that this cause be, and the same is hereby, remanded to the said district court, with directions to cause restitution to be made to the appellants of whatever sum of money they have been compelled to pay under that decree."

The undersigned, the district judge of the United States district court for the middle district of Alabama, to whom the mandate of the Supreme Court is directed, now comes to the honorable the justices of the Supreme Court, declaring that while he desires fully and faithfully, and without delay, to carry into effect the above-mentioned mandate, he finds himself embarrassed as to the means he shall use to do this. His own embarrassment has been intensified by the fact that the attorneys for the appellant, Morris, and the attorneys for the parties respectively made defendants to the motion, confess their inability to frame an appropriate decree in the premises.

The brief furnished to the district judge by one of the counsel for Morris, contends, among other things, that the original decree of September 17th, 1866, was void for want of jurisdiction in the court to render it, and that both the orders of distribution are also void, and
44 constitute no valid excuse for the payments made thereunder by Hardy; and a form of decree submitted by this counsel to the district judge, after reciting that Hardy's answer shows no good or valid reason why he should not make restitution of the amount collected from Morris, and after reciting that Hardy had no authority by law, under or by virture of the writ of fieri facias, to collect from the said Morris any amount whatever, embraces a proposition for the attachment and imprisonment of the said Hardy, until such time as he pays over to the said Morris the amount collected from him upon the said execution.

The counsel for Hardy, on the other hand, contended that the subject-matter of the suit being within the jurisdiction of the district court, all its orders, and decrees, and judgments were valid and binding until reversed by the superior tribunal, and until such judgment of reversal,

the marshal could not excuse himself from obeying its mandates, and executing its process. That the process of the court regularly issued, was not only the law to the executive officer of the court, but protected him fully from all consequences arising out of its enforcement by him, and that for the marshal, Hardy, to have disregarded, or to have failed to execute the writ of fieri facias, according to its exigence, would have been to render himself liable to be proceeded against and punished, as for a contempt.

These various positions were argued with great ability by counsel for the late marshal, and an imposing array of adjudicated cases cited in support of them. The propositions submitted upon Hardy's behalf, were and are, to the mind of the judge, self-convincing, and the decisions upon these points and the plainest principles of law, it is submitted, leave no room for cavil or doubt.

The counsel for James Q. Smith, esquire, the late United States district attorney, as to the moneys received by him under the order of the court of December 29, 1866, relied upon the same grounds and adjudications taken and cited by the counsel for the late marshal; and
45 no order was sought to be taken against either Cadle, the receiver of the National Bank at Selma, or Blake, the clerk of the district court for the middle district of Alabama.

Referring to the language of the injunction contained in the mandate of the honorable the Supreme Court, it will be seen that the district judge is required "to cause restitution to be made to the appellants of whatever sum of money they have been compelled to pay under that decree," meaning by "that decree" the judgment of condemnation pronounced by the district court upon the law and the facts, in the case of the United States of America against Josiah Morris and John F. Johnson.

And right here the question obviously occurs, who shall make restitution, and of whom has the district court jurisdiction to enable it as against them to enforce its orders. The answer to this inquiry is close at hand. The court has such jurisdiction over parties and privies to the particular action in respect of which its powers are sought. The parties to this action are the [the] United States of America as plaintiffs, against one hundred and twenty bales of cotton, and Johnson and Morris as claimants thereof.

After information filed, certain exceptive allegations were entered against the information. These were overruled by the judgment of the court, and a trial had on the merits, without the intervention of a jury; the judge being of the opinion that the 7th section of the act of Congress, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," approved July 17th, 1862, which required proceedings for the condemnation of rebel property to "conform as nearly as may be to proceedings in admiralty, or revenue cases," imposed upon the court itself the duty of trying the cause. This opinion and ruling the honorable the justices of the Supreme Court will remember was before the decision of the case of the "Union Insurance Company versus
46 the United States," or the case of "Armstrong's Foundry," and it may not be inappropriate to remark that in both of these cases the condemnation sought was of real estate, and an actual seizure of the thing itself was of course always possible, while in the case of Morris and Johnson, condemnation of specific personal property was prayed for. And in this connection it is proper, in view of the statement, in the opinion of the Supreme Court reversing the decree of the district court, that "the information at most presents only a case of the

unlawful conversion of property, and that for redress of such an injury this proceeding by information cannot be sustained," that the district judge should state, in justice to James Q. Smith, esquire, the late district attorney, that before the information in this case was filed by him, he brought an action of trover in the district court for the middle district, and sought in it to recover the value of these same one hundred and twenty bales of cotton.

That objection was taken by the attorney of Morris and Johnson, and it was contended that trover would not lie for personal property in the custody of the law, nor in a case where the title to the property could only be settled by a peculiar jurisdiction, and that the United States not having had either a general or special property in the cotton, and never having had actual possession of it, and their right to its immediate possession being dependant upon the result of a suit, they could not maintain an action for its unlawful conversion. The district judge was of opinion that these objections to the form of the action were well taken, and allowed Mr. Smith, the district attorney, to withdraw a juror, and instructed him to file a libel of information against the cotton under the acts of Congress approved August 6th, 1861, and July 17th, 1862, which was accordingly done, and which is the same libel of information set out in the transcript of record in the case now under consideration.

47 The undersigned, the district judge, further respectfully suggests to the honorable the justices of the Supreme Court of the United States, that following out what he understands to be the doctrine of the case of the Bank of the United States against the Bank of Washington, reported in 6th Peters, he might feel himself obliged in the execution of the mandate in the present case, unless otherwise instructed, to require the United States to make restitution to the appellant Morris of the moneys which he was compelled to pay them under a judgment in their favor regularly obtained, and an execution thereon regularly issued in the hands of their marshal, leaving the United States their right of recourse, if any, against the marshal, the district attorney, the receiver of the bank, and the informer, McCroskey.

This, it appears to the undersigned, would be according to the literal language of the mandate, but he is not clear that it would be according to its spirit or intention.

Besides, in the opinion of the district judge, such an order should not go against the United States, because on the question of title to these 120 bales of cotton they have a judgment in their favor, based upon the clearest evidence, and because one-half of the sum recovered has actually been paid over to the ascertained informer, and other parts of it paid to officers of the court under the direction of the law; and because also of the belief of the undersigned that the Supreme Court was not made acquainted with the fact of the payment to the informer of his moiety.

Now, therefore, in consideration of the premises, and in reliance upon the wisdom and justice of the honorable the Supreme Court, the undersigned submits this return for the consideration of the judges, and craving their indulgence if it shall be deemed irregular, most respectfully asks that they prepare for his instruction, and send to be executed

48 by him, such an order in the premises as will satisfy and fill the requirements of the mandate of the Supreme Court upon this behalf.

Montgomery, Ala., December 20, 1869.

RICHARD BUSTEED,
Judge of the District Courts of the United States for the State of Alabama.

49 UNITED STATES OF AMERICA,
District Court of the United States
For the Middle District of Alabama:

I, E. C. V. Blake, clerk of the district court of the United States for the middle district of Alabama, hereby certify that the foregoing twenty-eight written pages and twenty printed pages contains a true, correct, and complete copy of the motion for restitution, mandate of Supreme Court, answers of John Hardy, James Q. Smith, E. C. V. Blake, and Cornelius Cadle, jr.; and of the return of the Honorable Richard Busteed, judge, to the aforesaid mandate to the honorable the Supreme Court of the United States in the case of Josiah Morris and John F. Johnson, claimants of one hundred and twenty bales of cotton, appellants, versus the United States, reversed and remanded from said Supreme Court, as the same appears of file and of record in this office.

In testimony whereof I have hereunto set my hand and caused the seal of said district court to be affixed, at Montgomery, this the 7th of February, A. D. 1870.

[SEAL.] E. C. V. BLAKE,
Clerk U. S. Dist. Court Mid. Dist. Ala.

50 THE STATE OF ALABAMA,
City & County of Montgomery, ss:

This day personally came before me, George H. Patrick, United States commissioner for the middle district of Alabama, Josiah Morris, of the city, county, and State aforesaid, who makes oath that he is one of the parties defendant in the case of the United States vs. 120 bales of cotton—Josiah Morris and John F. Johnson—in the district court of the United States for the middle district of Alabama.

That judgment was announced in said cause by said court on the 17th day of December, A. D. 1866, for the condemnation of said cotton, and against the defendants, Morris and Johnson, for the sum of thirty thousand dollars, ($30,000 00,) and the further sum of one thousand six hundred and eighty-nine $\frac{55}{100}$ dollars, costs.

That thereupon this defendant, before the adjournment of said court sine die, to wit, during term time thereof, attempted to give bond and to take other necessary steps for taking the cause to the honorable the
Supreme Court of the United States; that the clerk of said dis-
51 trict court then and there stated to this defendant that the bond could not be taken and prepared until after the adjournment of the court, and that no prejudice should result to affiant from not giving bond before the adjournment; that within ten days following the adjournment a writ of error bond, to supercede the decree, was given and was approved by the clerk, who telegraphed his honor the presiding judge, (who had then gone to the city of Mobile,) that he had approved said bond, and asked the approval thereof by said judge; that said judge replied, in substance, that defendants were pursuing the wrong course, that appeal and not writ of error, was the only proper mode of taking the case to the Supreme Court.

Affiant further makes oath that a writ of error and a citation, with copy thereof for the plaintiff in the judgment to which the writ of error was taken, was filed at the same time with the above-mentioned writ of error and supersedeas bond; that subsequently a prayer for appeal, an appeal and supersedeas bond; an order allowing the ap-
52 peal, and a citation were presented to the judge for his approval and signature; that the sureties to the writ of error bond and appeal bond justified and proved they were fully sufficient, but his honor

decided that as the supersedeas bond had not been given on the appeal within ten days from the time the decree was rendered, that he would not suspend the decree unless by the consent of the district attorney, James Q. Smith.

That said Smith declined to consent, and the result was that, notwithstanding his readiness and efforts to supersede the execution of said decree, he was prevented from doing so in the manner above stated.

That on the 4th day of June, 1867, in vacation, affiant, after the court had adjourned sine die appeared in obedience to a notification to show cause why Judge Busteed should not make an order of distribution of the money collected from affiant, and by his attorney objected to any distribution being made by the said judge to any informer, and urged by his counsel several grounds why such money should not be distributed; among other things—

53 1. That the judge had no jurisdiction in vacation to order such distribution.

2nd. That it was not a case in which an informer could intervene, and that no part of the recovery could be awarded to an informer.

3rd. That the United States had no representative on said trial.

4th. That the case was then pending on an appeal to the Supreme Court, and if reversed by said court, the money to be paid out to the alleged informer might, and probably would, be lost.

That when the 3rd ground was announced, his honor replied, substantially: "We will take care of the interests of the United States." That when this motion was made and argued, this affiant had not the slightest knowledge or information that a previous order had been made on the 29th December, 1867, and never discovered it until long thereafter.

This order was made before the money was collected, which collection was made by the marshal for the middle district under an execution which was issued upon said decree on the 25th day of March,

54 1867, amounting, with costs, as will appear by the marshal's return of said date, to the sum of $31,689\frac{55}{100}$. That after said cause was reversed in the Supreme Court of the United States he caused the decree and mandate of said court to be enrolled, on motion, in the district court of the United States for the middle district of Alabama, and moved said court at the May term, A. D. 1869, to carry out said mandate and make restitution to this affiant of the monies collected from him by said marshal, he having paid the whole of said money, as appears by the affidavit of J. F. Johnson, on file and copied into what purports to be the judge's "Return to the Supreme Court," page 11.

That said motion came on to be tried on the 23rd day of June, 1869, when the counsel for this affiant placed upon the stand James Q. Smith, late district attorney for the United States, and who represented the alleged informer, McCroskey, in the motion made before the judge on the 4th day of June, 1867, and proposed to show, by appropriate questions to said Smith, through his attorneys, that the said McCroskey

55 had only received, as informer, the sum of about five thousand five hundred dollars, and that said Smith received about ten thousand five hundred dollars.

That the said judge refused to admit the inquiry as to the amount of money the said Smith had obtained, and this affiant being thus deprived of showing that the said amount of money was received by said Smith, of the money awarded the alleged informer, McCroskey, his counsel, for this reason alone, were unable to frame a decree to carry out the mandate of the said Supreme Court which would meet the entire justice of this case, as they announced to the judge. No receipts or

vouchers for the disbursement of said money were produced upon the trial, and this affiant has been unable to see any upon file in the clerk's office, although he has requested the said clerk to exhibit the same to him, and he is informed and believes that no such vouchers or receipts are now upon file in said court, or ever have been upon file therein.

Affiant further states that he is advised by his counsel, and be-
56 lieves from his own knowledge of the facts, that he is not responsible for any portion of said cotton, or the proceeds thereof, upon any principle of law or equity.

Affiant hereto attaches correct copies of some original correspondence now in his possession, and two telegrams in reference to superseding said cause upon an appeal to the Supreme Court of the United States.

JOSIAH MORRIS.

Sworn to and subscribed before me this 23rd day of February, A. D. 1870, at Montgomery, Ala.

GEO. H. PATRICK,
United States Commissioner for the Middle District of Ala.

57 *Copy.*

MOBILE, *March* 15, '67.

Hon. SAMUEL F. RICE, &c., &c., &c.

MY DEAR SIR: I have again patiently considered the application for a supersedias in the case of the United States vs. Johnson and Morris, and examined the authorities you submitted in the brief sent me here through the mails.

The courteous pertinacity with which you have pressed your professional views of this case has created embarrassment in my mind from the first; but, upon a calm review of all the circumstances, I am persuaded it is my duty to refuse any further interference by way of staying execution. In view, however, of the doubts entertained by many good lawyers upon the important question of your right to have had the issues in the case submitted to a jury, and in view of the fact that if the money secured by the judgment is made and paid over, the defendants may thereby suffer irreparable injury, I will, if you desire it, make no order for distribution until you have the opportunity to get the judg-
ment of the Supreme Court upon the questions involved, but will
58 retain the fund in the registry of the court until then—the district attorney advising me there is an informer in the case.

Respectfully, your obedient servant,

RICHARD BUSTEED.

59 *Copy desp'tch.*

MONTG., *Dec. 27th*, 1866.

Hon. RICH'D BUSTEED, *Mobile:*

Morris & Johnson have filed writ of error & bond. The bond is penalty of sixty thousand dollars, properly conditioned. The sureties on it are A. F. Given, William C. Ray, and James R. Powell, and are worth more than sixty thousand in unincumbered real estate in this district. I have approved the bond, and wish your approval of it. May I enter your approval of the bond? Answer immediately.

E. C. V. BLAKE.

60 *Copy of return dispatch.*

MOBILE, 27 *Dec.*, 1866.

Rec'd at Montg., Dec. 27, 1866.

E. C. V. BLAKE, Esq., *Clerk of U. S. Court:*

Your dispatch of to-day rec'd. The defendants are not pursuing the appropriate remedy as I think now; and after all the reflection I have thus far been enabled to give the subject, they must appeal, according to the course of the proceedings in admiralty, as specified in the fifty-third of the rules of the Supreme Court.

RICHARD BUSTEED.

61 *Copy.*

MOBILE, ALA., *Jan. 2nd*, 1867.

SAMUEL F. RICE, Esq., *Montgomery, Ala.:*

MY DEAR SIR: In the United States vs. Johnson & Morris, although I have no recollection that you asked for a jury—indeed, although I think you did not—I deem it proper to yield your request that the record shall state a demand and refusal. Less than this, in view of what I publicly stated on the subject of considering application for a jury trial in the confiscation cases, as being generally made, would not be just. The point is a most important one, and I desire the judgment of the Supreme Court upon it as much as any lawyer or layman. Respecting the justification of the sureties on the appeal bonds, I would be glad to save you or them trouble; but I do not see how, in this case, I can properly waive an examination by myself into their sufficiency. I send to-day to the clerk, to be filed, the findings and judgment in the case, copied from my minute-book.

Please show this letter to the U. S. district attorney.

Very truly yours, RICHARD BUSTEED.

62 Know all men by these presents that we, Josiah Morris and John F. Johnson, and Wm. C. Ray, Alexander F. Given, and James R. Powell, are held and firmly bound unto the United States in the sum of sixty thousand dollars, to be paid unto the United States; to which payment we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, dated the 27th day of December, in the year one thousand eight hundred and sixty-six.

Whereas the above-bounden Josiah Morris & John F. Johnson have appealed to the Supreme Court of the United States from a decree of the district court of the United States for the middle district of Alabama, bearing date the 17th day of December, 1866, in a cause in which the United States was libellant and the said Josiah Morris & Jno. F. Johnson were respondents; now, therefore, the condition of this obligation is such, that if the above-named appelants, Josiah Morris & John F. Johnson, shall prosecute their appeal with effect, and pay all such costs and expenses as shall be awarded against them as such appellants therein, then this obligation to be void; otherwise to remain in full force & effect.

63

(Signed) JOSIAH MORRIS.
JOHN F. JOHNSON.
WILLIAM C. RAY.
ALEXANDER F. GIVEN.
J. R. POWELL.

Signed, sealed, & delivered in pesence of—
(Sign'd) SAM'L F. RICE.
(Indorsed:) R. B., Dec'r 29, '66.

64 *Copy.*

U. S. district court for the middle district of Alabama.

THE UNITED STATES
vs.
120 BALES COTTON—JOSIAH MORRIS & J. F. JOHNSON.

Personally came before me Josiah Morris, who, being duly sworn, deposeth and saith that, after the judgment in the above-stated case was announced by the Hon. Richard Busteed, he, with his attorney, S. F. Rice, went to Mr. Blake, the clerk of said court, and asked to enter a bond to stay proceedings in the case, having his securities then in court; that the clerk said he had no time then to attend to it, as the business of the court required his attention. On the next day he again called the clerk's attention to it, when Mr. Blake said we must wait until after the final adjournment of the court, which would be in a few days; that after the adjournment of said court, and about the 24th Dec., he again called on Mr. Blake, & proposed to give the bond, but it not then being convenient for said Blake to attend to it, he being otherwise engaged. the said Morris asked Mr. Blake "if Thursday next, 27 Dec.," would answer, as he, the said Morris, would be absent from the city until that time; that said Blake said that would be in time; that he, the said Morris, did return on the 27th Dec., and within ten days after
65 the judgment, & give the required bond; that said Blake, after having said bond signed, & qualifying the securities, approved the bond, & despatched Hon. Richard Busteed, then at Mobile, for authority to enter his approval also; that Judge Busteed replied the same day, but said only, "The defendants are not pursuing the appropriate remedy," &c.; that he, the said Morris, then executed an appeal bond; that he, the said Morris, used due diligence to comply with all the requirements of the law.

JOSIAH MORRIS.

Sworn and subscribed to before me 1st Febr'y, 1867.
J. H. NETTLES, *J. P.*

(Indorsed:) United States Supreme Court. Josiah Morris vs. the dist. court of the United States for the middle district of Ala.

(Indorsement on cover:) No, 12, original. Ex parte in the matter of Josiah Morris and John F. Johnson, petitioners. Certificate of clerk & accompanying papers.

Filed 3d March, 1870.

Supreme Court of the United States.

ORIGINAL No. 12—DECEMBER TERM, 1869.

EX PARTE MORRIS & JOHNSON.

Petition for Mandamus to the Judge of the District Court of the United States for the Middle District of Alabama.

A libel was filed in the name of the United States to confiscate and condemn 120 bales of cotton, under the acts of Congress of 6th August, 1861, and 17th July, 1862.

After answering to the merits, the defendants excepted, on the grounds that the proceedings did not show any valid seizure at the time of filing the information, nor did the information allege any seizure under the acts of Congress.

There was a prayer for a jury trial, but the exceptions and the prayer were overruled, and the Judge, on 17th December, 1866, rendered a *personal* judgment against the petitioners in the sum of $30,000.

A fi. fa. issued on this judgment, which was returned satisfied in full by the marshal, John Hardy, on 14th January, 1867, he having collected thereon the sum of $31,689.55. (Rec. 17.)

Twelve days after judgment, to wit, 29th December,

1866, the Judge made an order anticipating the collection, by which he distributed of the money, when collected—

5 per cent. to District Attorney Smith.

1 per cent. to Marshal Hardy.

1 per cent. to Clerk.

One-half of the remainder to McCroskey, the informer.

The other half to be held in the registry, subject to the order of the Secretary of the Treasury, as provided by law. (P. 22.)

From this decree an appeal was taken to this Court, and at December term, 1868, it was determined that neither the act of 1861 nor the act of 1862 contemplated any proceeding as in admiralty where there existed no specific property or proceeds capable of seizure and capture, and that it was erroneous to have rendered a personal judgment in the case as made by the record.

The decree was reversed, and the cause remanded to the District Court—to CAUSE *restitution to be made to the appellants of whatever sum of money they have been compelled to pay under that decree.* (7 Wal., 579.)

Within ten days after the rendition of the judgment by the District Judge, the petitioners filed with the clerk a writ of error and citation, together with a supersedas bond, which was approved by the clerk, and who telegraphed the Judge, then in Mobile, asking his approval thereof. The Judge replied that a writ of error was not the proper remedy, and that the case could only be removed by an appeal.

Thus it is that the petitioners were prevented from taking the proper course to supersede the judgment, and when the appeal was resorted to the Judge decided it was too late to permit a supersedas bond.

When the mandate was presented to the Judge the petitioners moved the Court to compel the persons who had received the fund under the order of distribution to restore the same.

The proceedings on this motion are set forth in the Judge's return to the rule made in the case.

Written answers to the motion were filed by Hardy, the marshal, and Smith the district attorney, and Cornelius Cadle, receiver First National Bank, Selma.

Hardy's answer sets forth that, in compliance with the decree for distribution, made at the June term, 1866, and to the decree made at the June term, 1867, declaring E. E. McCroskey to be the informer in the case, and entitled to compensation as such; he had paid to said McCroskey $14,245.86. That he had also paid to J. Q. Smith, district attorney, $1,532.56. That the balance of the fund collected from Morris, to wit, $15,911.19—after deducting the costs and disbursements—had been deposited in the First National Bank of Selma, under orders from the Government at Washington, as shown by Exhibit C to his answer, and that before this money had been drawn from the bank it had failed and gone into liquidation. (P. 3.)

Smith, the district attorney, acknowledges in his answer to have received 5 per cent. under the order of distribution.

There was no appearance or answer of Mr. Croskey, the informer, who was stated to be beyond the limits of the State.

In the oral examination of Smith, who had appeared before the Judge as the attorney of McCroskey, on 4th June, 1867, it was proposed to show by Smith himself that McCroskey had in fact received but the sum of $5,500, and that he, Smith, had received $10,500; but the Judge sustained the objection to this offer, and the evidence was excluded.

The result is that nothing has been done by the Judge to "cause restitution to be made," as commanded by the mandate.

The Judge, in his return, infers that when this Court made the order for "restitution" it was done in ignorance of the fact that a "distribution" had been already effected. But in this he errs, as seen by the reference already made to the order of "distribution," found in the record of the original case, at p. 22.

The non-action of the Judge is placed by him on the further ground, that as the judgment was valid until reversed, all that had been done under it was rightfully done and cannot be undone on the reversal, and that the Court had now no longer any jurisdiction of the parties. He therefore submits himself to the Court, asking for such instructions as are necessary "to enable him to satisfy and fill the requirements of the mandate."

The law applicable to this case is to be found stated per

Holt, C. J. Where plaintiff has execution, and the money is levied and paid, and judgment is afterwards reversed; there, because it appears on the record that the money is paid, the party shall have restitution without scire facias.

When judgment is set aside, after execution, for irregularity, there needs no scire facias for restitution, but an attachment shall be granted upon the rule for contempt, if there be not a restitution.

Anonymous, 2 Salk., 588.

In speaking of "restitution," Gibson, C. J., says, that when judgment is reversed a writ goes not as a matter of course, but on the special order of the Court to restore the plaintiff in error to whatever he had lost in consequence of the erroneous judgment. That an order of restitution is not merely collateral to the judgment of reversal, but a part of the judgment itself. In this respect, the judgment, when entered in form, is not only that the judgment in the Court below be reversed, but that "it is considered that the defendant be restored to all things which he has lost on occasion of the judgment aforesaid," and the writ of restitution which is issued in pursuance of it, and in which the sheriff is commanded to levy the money of the chattels of the plaintiff, or to *arrest his person*, is strictly an execution.

Duncan vs. Kirkpatrick, 13 S. & R., 294.

All the parties who received portions of the fund were interested in the litigation. The distribution was made under law securing their interests; they were all quasi parties, though not technically parties on the record, and

their connection with the litigation placed them under the jurisdiction of the Court until the litigation was finally settled.

The marshal and district attorney were peculiarly within the power of the Court in their character as officers.

That their resignation had taken place when the mandate of the Court was sent down does not affect the jurisdiction. As to all past acts the power of the Court is maintained, and will be vindicated when necessary by the process of attachment for contempt.

The Laurens, 1 Ab., 514.

Brackaway v. Wilbur, 5 John., 356.

And this process of attachment is frequently exercised against persons not parties to the suit.

As for the rescue of property on process.

People v. Church, 2 Wend., 262.

Against referees for not reporting.

Thompson v. Parker, 3 John., 260.

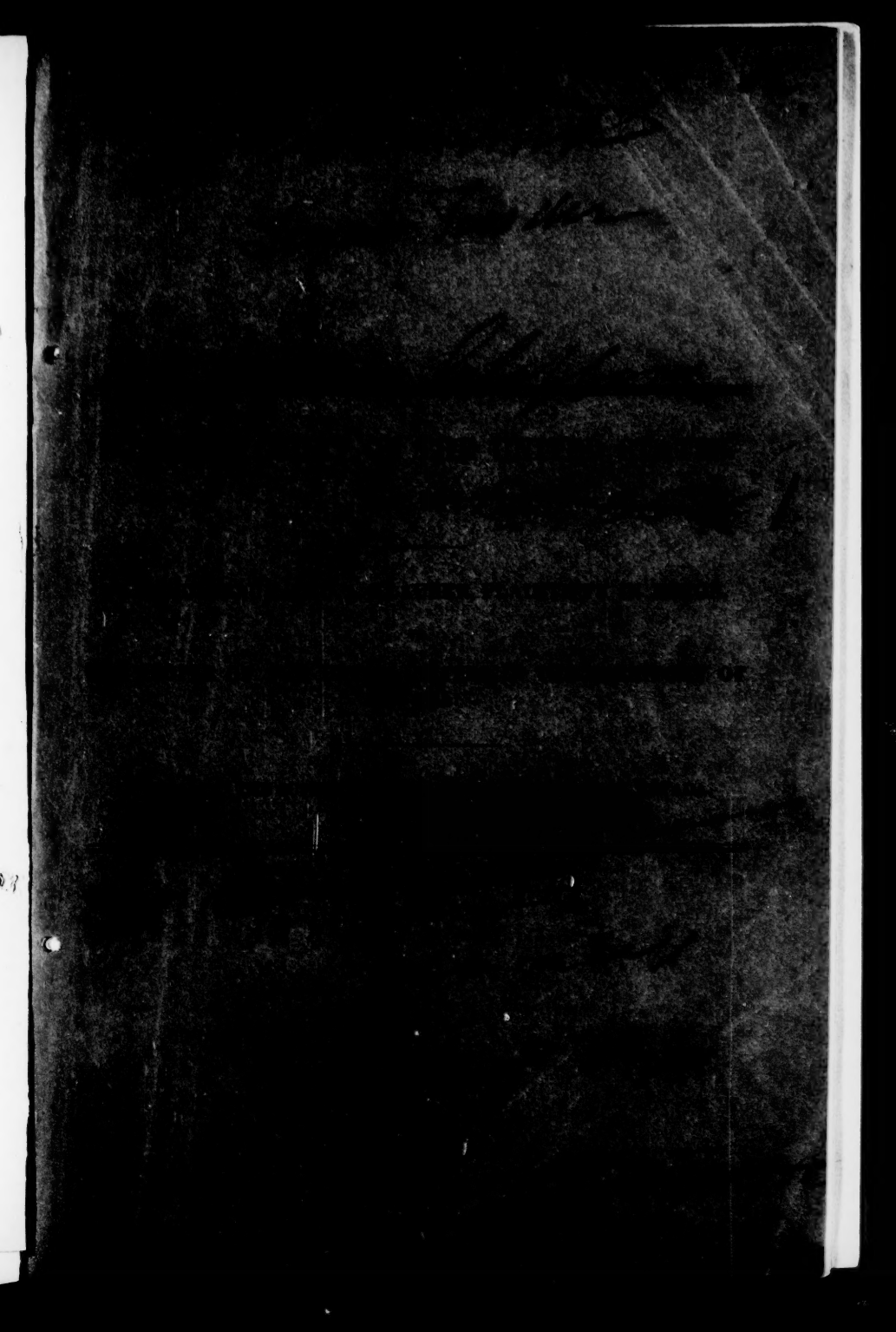
For not paying money into court.

Adams v. Haskel, 6 Cal., 316.

That the United States was plaintiff in the suit does not withdraw them from the order of restitution. They are as much compelled to abide by and perform an order for restitution as any other plaintiff, though the means of enforcing a compliance may be wanting. The record shows that they have received $15,011.19 of the defendant's money on a false judgment. The money was collected by the marshal, their agent, and placed in a depositary selected

by them. Whether, owing to the condition of that depositary, they will ever realize all or only a portion of that fund, is of no legal consequence to the party from whom it was collected. As against the other parties there should have been not only an order to refund the amounts they have received, but on failure to do so an attachment should have issued.

In ascertaining the amount to be refunded by Smith, the attorney, the parties should be permitted to interrogate him, as they proposed to do, as to what portion of this specific fund had by agreement between the informer and himself been awarded to each.

P. PHILLIPS,
Pro Pet.

APRIL, 1870.